

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN DELEON SAMUEL,

Defendant-Appellant.

UNPUBLISHED

July 29, 2008

No. 278272

Oakland Circuit Court

LC No. 2006-211277-FH

Before: Saad, C.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of unarmed robbery, MCL 750.530. He was sentenced as a fourth habitual offender, MCL 769.12, to six to 40 years in prison, and appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The prosecution alleged that defendant went to a Speedway gas station, placed cartons of cigarettes into a garbage bag, and after being confronted by employee Tabi Barimah, used force or violence to overcome Barimah and employee Mary Elizabeth Armstrong to escape from the scene. Defendant dropped the bag inside the station. The cigarettes in the bag were valued in excess of \$2,400.

Defendant testified that he went to the Speedway and found the bag of cigarettes. He stated that he picked up the bag with the intention of asking about the cigarettes, and then Barimah grabbed him and accused him of stealing the cigarettes. Defendant denied using force against either Barimah or Armstrong in the store. Defendant acknowledged that during an outdoor pursuit he slung Barimah to the ground, but asserted that he did so because he was afraid of being arrested and was trying to get away from the scene.

The trial court instructed the jury on the elements of unarmed robbery, and stated that the prosecution was required to prove beyond a reasonable doubt that “defendant used force or violence against Tabi Barimah and/or Margaret Armstrong.” The trial court did not instruct the jury that it must agree unanimously that defendant used force violence against Barimah but not Armstrong, or against Armstrong but not Barimah, or that defendant used force or violence

against both Barimah and Armstrong. The trial court instructed the jury that its verdict must be unanimous. The jury found defendant guilty after deliberating for approximately 20 minutes.

We review a claim of instructional error de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002).

Defendant argues that the trial court denied him due process because it failed to instruct the jury that it must agree unanimously that he used force or violence against Armstrong but not Barimah, or against Barimah but not Armstrong, or against both Armstrong and Barimah. Defendant asserts that because no such instruction was given, it cannot be known if the jury agreed unanimously on one set of facts that constituted the offense of unarmed robbery. We disagree.

Waiver constitutes the intentional abandonment of a known right, while forfeiture constitutes the failure to timely assert a right. A party who forfeits a right might still obtain appellate review for plain error, but a party who waives a known right cannot seek appellate review of a claimed deprivation of the right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). A party waives review of the propriety of jury instructions when he approves the instructions at trial. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Defense counsel approved the instructions on two occasions. The trial court indicated to counsel the instructions it intended to read, and asked each party if it wished to have any other instructions read to the jury. Defense counsel indicated that he was satisfied with the list of instructions the trial court intended to read. After the trial court instructed the jury, it inquired if the parties were satisfied with the instructions as read. Defense counsel stated that he was “[s]atisfied” with the instructions. Thus, by expressly approving the instructions, including the unanimity instruction as given, defendant has waived this issue on appeal. *Id.*

Moreover, we note that even if defendant had not waived this issue, he would not be entitled to relief. A special instruction regarding unanimity as to a particular element for which evidence of multiple acts has been presented is not always necessary in order to preserve a defendant’s right to due process. A special instruction is necessary if: (1) the alternative acts are materially distinct either because the acts are conceptually distinct or the proofs are materially different, or (2) the jury might be confused or might disagree about the factual basis for the defendant’s guilt. *People v Cooks*, 446 Mich 503, 524; 521 NW2d 275 (1994). In this case, defendant maintained that he did not assault either Armstrong or Barimah. However, surveillance footage taken at the time defendant was in the station showed defendant pushing Barimah. The footage was shown to the jury. Defendant has not shown that there was reason to believe that the jury would be confused or would disagree about the basis for the verdict. *Id.*

Affirmed.

/s/ Henry William Saad
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello